ASM Development (KL) Sdn Bhd v Econpile (M) Sdn Bhd and other appeals

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(C)(A)-2363–12 OF 2019, W-02(C)(A)-2364–12 OF 2019 AND W-02(C)(A)-2365–12 OF 2019
NOR BEE ARIFFIN, NANTHA BALAN AND MOHD NAZLAN JJCA
3 OCTOBER 2022

Adjudication — Adjudication decision ('AD') — Stay of — Circumstances which justified the grant of stay of AD — Whether applicant for stay must show requirements in s 16 of Construction Industry Payment and Adjudication Act 2012 had been met and special circumstances existed for stay to be granted — Construction Industry Payment and Adjudication Act 2012 s 16

The appellant developer had appointed the respondent as its main contractor to carry out piling works in a mixed development project consisting of seven blocks of serviced apartments. Disputes between the parties arose. Among other things, the appellant contended that the respondent had caused substantial delays and failed to complete the project by the extended completion date whilst the respondent contended that it had not been paid for work that had been certified for payment. The respondent commenced proceedings under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') for an order requiring the appellant to pay the amount owing. At the same time, the respondent referred the subject-matter of its adjudication to arbitration. The appellant raised a counterclaim/set off against the respondent's claim. Before the adjudication decision ('AD') was delivered, the respondent terminated the contract. The adjudicator allowed the respondent's claims, dismissed the appellant's counterclaim and ordered the appellant to pay the respondent the adjudicated sum of RM59,767,269.32. On the appellant's failure to pay the sum, the respondent applied to the High Court under s 28 of the CIPAA for an order to enforce the AD. It also commenced execution proceedings including applying for a writ of seizure and sale against the appellant's land and obtaining an order to sell the land by public auction and also serving upon the appellant a statutory demand under s 466 of the Companies Act 2016 threatening winding-up proceedings if the sum was not paid. The appellant successfully applied for a Fortuna injunction to prevent a winding-up petition from being presented and applied to set aside as well as to stay the AD under ss 15 and 16, respectively, of the CIPAA. The High Court allowed the respondent's enforcement application and dismissed the appellant's setting aside and stay applications. The Court of Appeal affirmed the decisions in respect of the enforcement and setting aside applications. The instant decision was against the High Court's refusal to stay the AD.

Held, unanimously granting the appellant a stay of the AD pending the outcome of the arbitration between the parties:

(1) Section 16(1) of the CIPAA allowed a party to apply to the High Court to stay an AD where: (a) an application to set aside the AD under s 15 had been made; or (b) the subject-matter of the AD was pending final determination by arbitration or by the court. In *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22, the Federal Court held that whilst a stay should not be too readily given, the court may exercise its discretion to stay the enforcement of the AD under s 16(1)(b) of the CIPAA where the subject-matter of the AD was pending final determination by arbitration or by the court when either there was a clear and unequivocal error in the AD or it was in the interest of justice to grant the stay (see paras 19–20 & 22).

(2) The CIPAA did not prohibit the court from granting a stay of the AD even though it had granted an application to enforce the AD. Requests for stay could be made, and granted, provided the requirements under s 16(1)(a) and (b) of the CIPAA were satisfied and it was also shown with cogent evidence that there were special circumstances that justified the grant of a stay (see paras 23–25).

(3) Whilst it was not demonstrated in the instant case that there were clear errors in the AD to justify a stay, the appellant had shown that it was deserving of a stay of the AD based on a combination of factors which created the existence of special circumstances. Among the several important issues, the appellant sought to ventilate at the arbitration proceedings were: (a) whether the time for completion was at large or validly extended, whether the certificate of non-completion was valid; (b) whether the appellant had the right to impose liquidated and ascertained damages of RM14,005,040 on the respondent; (c) whether the appellant was liable to make further payment to the respondent after the termination of the contract until issuance of final account; (d) whether the issuance of the certificate of payment was a condition precedent to the respondent's right to receive payment; (e) whether the defective works claim was bona fide; and (f) whether the contract was validly terminated and whether the respondent was liable to the appellant for the delay in the handing over vacant possession of 1,403 units of end-purchasers (see paras 68–71& 73).

(4) Other factors which justified the grant of stay in the instant case were: (a) the respondent's taking out of a writ of seizure and sale against the appellant's land and obtaining an order to sell the same by auction at a reserve price of RM250m when it was purportedly worth RM400m; (b) the possibility of the project being jeopardised, thereby affecting the interests of 1,403 end-buyers; (c) the fact that the adjudicator dismissing the appellant's counterclaim for LAD even though it appeared that the

respondent failed to meet the deadline for handing over; (d) the fact that the appellant's set off and counterclaim in the arbitration was more than four times the adjudicated sum payable to the respondent; (e) the uncertainty over whether the respondent was financially capable of repaying the adjudicated sum if the appellant succeeded in the arbitration; and (f) the fact that the Fortuna injunction was granted to the appellant predominantly on the court's satisfaction that there existed serious counterclaims and set offs in the arbitration proceedings which validly gave rise to a genuine dispute over the adjudicated amount (see paras 42, 50, 54, 60, 64–65 & 74–77).

(5) Although the object and purpose of the CIPAA was to provide for quick payment through adjudication and thereby ensure cash flow in the construction industry, the granting of a stay of the AD in the instant case would not defeat that statutory intent as it was in the interest of justice that the stay was granted pending the final determination of the disputes between the parties in the arbitration process (see paras 18, 21 & 78–79).

[Bahasa Malaysia summary

Pemaju perayu telah melantik responden sebagai kontraktor utamanya untuk menjalankan kerja-kerja pemantakan dalam projek pembangunan bercampur yang terdiri daripada tujuh blok pangsapuri perkhidmatan. Pertikaian antara pihak timbul. Antara lain, perayu berpendapat bahawa responden telah menyebabkan kelewatan yang banyak dan gagal menyiapkan projek tersebut pada tarikh lanjutan penyiapan manakala responden berpendapat bahawa ia tidak dibayar untuk kerja yang telah diperakui untuk pembayaran. Responden memulakan prosiding di bawah Akta Pembayaran dan Adjudikasi Industri Pembinaan 2012 ('APAIP') untuk satu perintah yang memerlukan perayu membayar amaun yang terhutang. Pada masa yang sama, responden merujuk perkara-perkara adjudikasinya kepada timbang tara. Perayu membangkitkan tuntutan balas/*set off* terhadap tuntutan responden. Sebelum keputusan adjudikasi ('KA') disampaikan, responden telah menamatkan kontrak. Adjudikator membenarkan tuntutan responden, menolak tuntutan balas perayu dan memerintahkan perayu membayar responden jumlah yang diadjudikasi sebanyak RM59,767,269.32. Pada kegagalan perayu untuk membayar jumlah tersebut, responden memohon kepada Mahkamah Tinggi di bawah s 28 APAIP untuk mendapatkan perintah untuk menguatkuasakan KA. Ia juga memulakan prosiding pelaksanaan termasuk memohon writ penyitaan dan penjualan terhadap tanah perayu dan mendapatkan perintah untuk menjual tanah tersebut melalui lelongan awam dan juga menyampaikan tuntutan statutori kepada perayu di bawah s 466 Akta Syarikat 2016 bagi memulakan prosiding penggulungan sekiranya jumlah tersebut tidak dibayar. Perayu berjaya memohon injunksi Fortuna untuk menghalang petisyen penggulungan daripada dikemukakan dan memohon untuk mengetepikan serta mengekalkan KA masing-masing di bawah ss 15 dan 16 APAIP.

A Mahkamah Tinggi membenarkan permohonan penguatkuasaan responden dan menolak permohonan mengenepikan dan menangguhkan permohonan perayu. Mahkamah Rayuan mengesahkan keputusan berkenaan dengan penguatkuasaan dan mengetepikan permohonan. Keputusan semasa adalah terhadap keengganan Mahkamah Tinggi untuk menggantung KA.

B

Diputuskan, sebulat suara membenarkan perayu penggantungan KA sementara menunggu keputusan timbang tara antara pihak-pihak:

(1) Seksyen 16(1) APAIP membenarkan pihak memohon kepada
C Mahkamah Tinggi untuk menggantung KA jika: (a) permohonan untuk mengetepikan KA di bawah s 15 telah dibuat; atau (b) perkara utama KA sedang menunggu penentuan muktamad oleh timbang tara atau oleh mahkamah. Dalam *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22, Mahkamah Persekutuan memutuskan bahawa
D walaupun penggantungan tidak sepatutnya diberikan dengan mudah, mahkamah boleh menggunakan budi bicaranya untuk menggantung penguatkuasaan KA di bawah s 16(1)(b) APAIP di mana perkara utama KA sedang menunggu penentuan muktamad oleh timbang tara atau oleh mahkamah apabila sama ada terdapat kesilapan yang jelas dan nyata
E dalam KA atau adalah demi kepentingan keadilan untuk memberikan penggantungan (lihat perenggan 19–20 & 22).

(2) APAIP tidak melarang mahkamah daripada membenarkan penggantungan KA walaupun ia telah membenarkan permohonan
F untuk menguatkuasakan KA. Permohonan untuk penggantungan boleh dibuat, dan diberikan, dengan syarat keperluan di bawah s 16(1)(a) dan (b) APAIP telah dipenuhi dan ia juga ditunjukkan dengan bukti kukuh bahawa terdapat keadaan istimewa yang mewajarkan pemberian penggantungan (lihat perenggan 23–25).

G (3) Walaupun ianya tidak ditunjukkan dalam kes semasa bahawa terdapat kesilapan yang jelas dalam KA untuk mewajarkan penggantungan, perayu telah menunjukkan bahawa ia layak untuk penggantungan KA berdasarkan gabungan faktor yang mewujudkan kewujudan keadaan istimewa. Antara beberapa isu penting yang ingin dikemukakan oleh
H perayu pada prosiding timbang tara adalah: (a) sama ada masa untuk penyiapan adalah pada umumnya atau dilanjutkan secara sah; (b) sama ada perakuan tidak siap adalah sah; (c) sama ada perayu mempunyai hak untuk mengenakan ganti rugi tertentu dan ditetapkan sebanyak RM14,005,040 ke atas responden; (d) sama ada perayu
I bertanggungjawab untuk membuat bayaran lanjut kepada responden selepas penamatan kontrak sehingga pengeluaran akaun muktamad; (e) sama ada pengeluaran sijil pembayaran merupakan syarat duluan kepada hak responden untuk menerima bayaran, sama ada tuntutan kerja yang rosak adalah bona fide; dan (f) sama ada kontrak tersebut telah

ditamatkan secara sah dan sama ada responden bertanggungjawab kepada perayu atas kelewatan penyerahan milikan kosong 1,403 unit pembeli akhir (lihat perenggan 68–71 & 73).

(4) Faktor-faktor lain yang mewajarkan pemberian penggantungan dalam kes semasa adalah: (a) responden mengeluarkan writ penyitaan dan penjualan terhadap tanah perayu dan mendapatkan perintah untuk menjualnya secara lelong pada harga rizab sebanyak RM250 juta apabila ia dikatakan bernilai RM400 juta; (b) kemungkinan projek tersebut terjejas, sekali gus menjejaskan kepentingan 1,403 pembeli akhir; (c) fakta bahawa adjudikator menolak tuntutan balas perayu untuk LAD walaupun ternyata responden gagal memenuhi tarikh akhir untuk penyerahan; (d) fakta bahawa *set off* dan tuntutan balas perayu dalam timbangtara adalah lebih daripada empat kali jumlah yang diadjudikasi yang perlu dibayar kepada responden; (e) ketidakpastian sama ada responden mampu dari segi kewangan untuk membayar balik jumlah yang diadili sekiranya perayu berjaya dalam timbang tara; dan (f) hakikat bahawa injunksi Fortuna telah diberikan kepada perayu terutamanya atas kepuasan mahkamah bahawa wujudnya tuntutan balas yang serius dan *set off* dalam prosiding timbang tara yang secara sah menimbulkan pertikaian tulen mengenai jumlah yang diadjudikasi (lihat perenggan 42, 50, 54, 60, 64–65 & 74–77).

(5) Walaupun tujuan APAIP adalah untuk menyediakan pembayaran cepat melalui adjudikasi dan dengan itu memastikan aliran tunai dalam industri pembinaan, pemberian penggantungan KA dalam kes semasa tidak akan mengalahkan niat berkanun demi kepentingan keadilan bahawa penggantungan tersebut diberikan sementara menunggu penentuan muktamad pertikaian antara pihak dalam proses timbang tara (lihat perenggan 18, 21 & 78–79).]

Cases referred to

ASM Development (KL) Sdn Bhd v Econpile (M) Sdn Bhd [2021] 8 MLJ 99, HC (refd)

EA Technique (M) Sdn Bhd v Malaysia Marine and Heavy Engineering Sdn Bhd [2020] MLJU 2058; [2021] 1 AMR 594, HC (refd)

Enra Engineering and Fabrication Sdn Bhd v Gemula Sdn Bhd and another case [2020] 7 MLJ 482, HC (refd)

Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal [2020] 6 MLJ 224, FC (refd)

Pasukhas Sdn Bhd v Empire Multiple Sdn Bhd and another appeal [2019] MLJU 1393, HC (refd)

Subang Skypark Sdn Bhd v Arcradius Sdn Bhd [2015] 11 MLJ 818, HC (refd)

View Esteem Sdn Bhd v Bina Puri Holdings Bhd [2018] 2 MLJ 22, FC (refd)

Legislation referred to

Construction Industry Payment and Adjudication Act 2012 ss 13, 15, 16, 16(1)(a), (1)(b), 28, 37
Companies Act 2016 s 466, 466(1)

Appeal from: *Econpile (M) Sdn Bhd v ASM Development (KL) Sdn Bhd and another summons* [2020] MLJU 1146 (High Court, Kuala Lumpur)

Ng Sim Hong (Edwin Lim & Suren) for the appellant.
Wong Chong Wah (with Lam Wai Loon, Wong Chun-Keat, Serene Hiew and Lim Ren Wei) (Harold & Lam Partnership) for the respondent.

Mohd Nazlan JCA:

INTRODUCTION

[1] This is an appeal against the decision of the High Court which refused the appellant's application for a stay of the enforcement of an adjudication decision in favour of the respondent. After having heard the appeal which was conducted by way of a remote communication technology via Zoom we unanimously decided to allow the appeal and highlighted the broad reasons for the same. These grounds of judgment contain the full reasons for our decision.

KEY BACKGROUND FACTS

[2] By way of a letter of award dated 26 September 2016 ('the contract'), the appellant as the developer engaged the respondent as its main contractor to carry out piling works for a mixed development project consisting of seven blocks of serviced apartments in Kuala Lumpur for an original contract sum of RM280m ('the project').

[3] The contract incorporated the agreement and conditions of PAM Contract 2006 (with quantities), with modifications and amendments ('the PAM conditions of contract'). The contractual completion date was on 7 January 2018 but parties extended the date to 7 April 2018. The parties then executed a PAM contract dated 17 October 2017 incorporating the change in the contractual completion date.

[4] The appellant contended that the respondent was in breach of the contract for its failure to perform the works as promised, causing substantial delay and non-completion of the project by the extended completion date. The project's architect, Arkitek L2CA Sdn Bhd had also issued a certificate of non-completion dated 7 April 2018 to the respondent, informing of the imposition of the liquidated damages from the amount due.

[5] The case of the respondent is that it had submitted 24 progress claims to the appellant in respect of the works done, with the progress claims duly valued by the project's quantity surveyor, and endorsed by the architect. These progress claims were then forwarded to the superintending officer ('SO') for approval and issuance of payment certificates for the progress claims. The SO was also the executive director of the appellant company at the material time.

[6] Under the contract, the SO was obliged to certify the respondent's progress claims within 30 days from the date of submission, and the appellant was to make payment of a payment certificate within 60 days from the date of issuance of the interim payment certificate.

[7] The respondent however asserted that the SO had wrongfully and without any justification withheld the approval and certification of progress claims No 16 onwards, even though these progress claims had been duly evaluated by the project's quantity surveyor and endorsed by the architect.

[8] It is also of note that in respect of the last issued interim payment certificate No 15, despite the fact that the quantity surveyor had valued the works done under progress claim No 15 in the amount of RM9,721,145.14, the SO had unilaterally only certified RM1,031,622.54, representing an under-certification of an amount of RM8,689,522.60.

[9] The respondent reacted — by issuing, under the PAM conditions of contract, three notices of default alleging breach of contract against the appellant, dated 8 January 2019, 29 January 2019 and 25 February 2019, respectively. Although the first two notices of default had been subsequently retracted to facilitate negotiation for an amicable resolution of the disputes, attempts to achieve the same fell through.

[10] As a result, the respondent proceeded to commence adjudication proceeding under the Construction Industry Payment and Adjudication Act 2012 ('the CIPAA') (which came into force on 15 April 2014) against the appellant to claim for the sums valued by the project's quantity surveyor and endorsed by the architect in respect of progress claims Nos 16–24, as well as the under-certified sum under certificate No 15. The appellant on the other hand raised counterclaim and/or set off in the form of liquidated damages and defects claims against the respondent.

[11] Before the delivery of the adjudication decision, given the continued defaults by the appellant in failing to certify and make payment of further progress claims submitted by the respondent, on 13 March 2019, the respondent served a notice of determination on the appellant pursuant to clause 26 of the PAM conditions of contract to terminate the contract.

[12] At the same time the parties have also referred their disputes arising from the termination of the contract to arbitration.

[13] In the adjudication decision dated 21 June 2019, the learned adjudicator allowed the respondent's claims and dismissed the appellant's counterclaim. It was ordered that the appellant shall make payment of the principal adjudicated sum of RM67,767,269.32 to the respondent (subsequently amended to RM59,767,269.32 in a supplementary adjudication decision dated 7 July 2019).

[14] But the appellant failed to make any payment pursuant to the said adjudication decision. The respondent then moved to file the application to enforce the said adjudication decision pursuant to s 28 of the CIPAA. The appellant on its part sought to set aside the adjudication decision under s 15, as well as applied for a stay of the same pursuant to s 16 of the Act.

[15] The High Court on 29 January 2020 allowed the respondent's enforcement application and dismissed the appellant's setting aside and stay applications, with costs in favour of the respondent. Dissatisfied with these decisions of the High Court, the appellant appealed to this court.

[16] We affirmed the decisions of the High Court other than in respect of its refusal to grant stay, the appeal against which we herein allowed. These grounds of judgment concern only with the appeal in respect of the High Court's refusal of the stay of the adjudication decision.

EVALUATION BY THIS COURT

The CIPAA and stay of adjudication decision

[17] In considering this appeal on the stay request which was denied, it is useful to recall the objective of CIPAA, in light of the fact that the underlying issue here is the adjudication decision which basis was the CIPAA, as was the stay application, which was filed to stay the enforcement of the adjudication decision.

[18] The scheme of the CIPAA is primarily to provide a statutory adjudication process, designed to facilitate the construction industry in addressing cash-flow problems — late or non-payments — which are affecting key players such as contractors, subcontractors, suppliers and consultants for the works undertaken and services rendered. It recognises that these parties would usually encounter challenges in terms of time and costs to mount a swift conclusion of litigation suits to recover such payments said to be due to them.

[19] Section 16(1)(b) of the CIPAA however provides the power for the court to stay an adjudication decision pending final determination of the subject matter in, relevant to the instant case, an arbitration proceeding.

[20] The provision empowering the grant of a stay is set out concisely in s 16 of the CIPAA, as follows:

> 16 Stay of adjudication decision
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> (1) A party may apply to the High Court for a stay of an adjudication decision in the following circumstances:
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> (a) an application to set aside the adjudication decision under section 15 has been made; or
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> (b) the subject matter of the adjudication decision is pending final determination by arbitration or the court.
>
> (2) The High Court may grant a stay of the adjudication decision or order the adjudicated amount or part of it to be deposited with the Director of the KLRCA or make any other order as it thinks fit.

[21] The following observations by Zulkefli Ahmad Makinudin PCA, in a leading authority on this subject — *View Esteem Sdn Bhd v Bina Puri Holdings Bhd* [2018] 2 MLJ 22 on the principles governing stay applications under the CIPAA, merit reproduction:

> [76] The High Court in the present case held that an application under s 16 of the CIPAA can only be allowed in exceptional circumstances. These exceptional circumstances were then described as necessarily relating 'to the financial aspects of payment or repayment; as it is the whole concept behind adjudication and payment disputes'.
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> [77] The reasoning adopted by the High Court for such a stringent test was that it took into account the object and purpose of CIPAA to provide for quick payment through adjudication and that it was the approach favoured by the courts in England, Australia and Singapore. The court placed much emphasis on the decision of the Singapore Court of Appeal in *WY Steel Construction Pte Ltd*.
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> [78] The Court of Appeal in the present case adopted a similar approach. It said that unless there was 'overwhelming evidence' that the contractor would be unable to meet its contractual obligations as well as meet its financial obligations to the employer, a stay ought not to be granted.
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> [79] *We are of the view that such a stringent test is not justified under CIPAA because s 16 of the CIPAA itself contains no such limiting requirement or intent. Section 16 of CIPAA should be treated as one of the safeguards to a likely wrongful adjudication decision and which empowers the court to find a suitable middle ground in cases where there has been clear and unequivocal errors.*

A [80] It is to be noted that after a review of the legislation in the other jurisdictions, the scheme in each jurisdiction is different. Other jurisdictions do review the adjudication awards, and where appropriate, deny enforcement in whole or in part. It can be seen as follows:

B (a) in England, statutory adjudication is governed by the HGCR Act and the Scheme and the Arbitration Act 1996. Under reg 24 of the Scheme an order of the adjudicator may be enforced by reference to s 42 of the UK Arbitration Act. At the application for enforcement, the responding party may seek to resist the enforcement on the grounds of want of jurisdiction of the adjudicator or a breach of natural justice;

C (b) in Australia, different States have different statutory adjudication schemes. In the State of Victoria in Australia where there is a failure to respond to a payment claim, the claiming party must apply for leave to enter judgment at which point a court can review the claim. There is a provision for a court-based review of the adjudicator's decision. Apart from that, judicial review or *certiorari* is available to challenge any adjudication decision. This includes challenging an adjudication decision by using *Wednesbury* unreasonableness. Importantly, Victoria, Australia, provides for an automatic stay after an adjudication decision, on the launching of arbitration to challenge the award subject to security being provided by the responding party;

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F (c) in New Zealand, the scheme is again different under the Construction Contracts Act 2002. Here the claiming party is entitled to seek statutory adjudication on progress payment. Those progress payments are statutorily defined under s 17 of the Act to include an accounting of defective works and liquidated ascertained damages. Once an adjudication decision is delivered, s 73 of the Act sets out the steps for applying to court for judgment for enforcement of the award. This is apart from the right of the responding party to seek judicial review against the award; and

G (d) in Singapore, there is a specific provision under s 18 of the Singapore Act 2006 which allows for review of adjudication awards. It is after the review process concludes that the claiming party must then apply to court for an order of enforcement.

H [81] From observations made on the laws from the other jurisdictions, an adjudication award can be reviewed and challenged in a variety of ways. A stay application in other jurisdictions is made only when the other avenues for review and challenge to the award are exhausted. It therefore makes sense that applications for stay in other jurisdictions are rarely granted. We are of the view that it is however not right to rely on those decisions to justify restricting the statutory power of stay I in Malaysia simply on the financial status of the other party. The CIPAA contains no such restriction.

[82] *We are in agreement with the contention of the appellant that a more liberal reading of s 16 of the CIPAA would allow some degree of flexibility to the courts to stay the award where there are clear errors, or to meet the justice of the individual case. It is accepted that*

a stay of the award ought not be given readily and caution must be exercised when doing so. However to restrict the application of s 16 of the CIPAA in the manner proposed by the High Court, and the Court of Appeal, would be to strip it of any utility. (Emphasis added.)

[22] The Federal Court in *View Esteem* has therefore made it clear that whilst a stay should not be too readily given, the court may exercise its discretion under s 16(1)(b) of the CIPAA to grant a stay of the enforcement of an adjudication decision pending the disposal of litigation or arbitration (whichever applicable) when either there is a clear and unequivocal error in the adjudication decision or that it is in the interest of justice for the court to so direct.

[23] It is useful to observe that despite the enforcement order on the adjudication decision (which decision of the High Court we have affirmed on appeal) this is no objection to the granting of a stay on the same adjudication decision. There are no express prohibitions in the CIPAA stating that stay applications cannot be allowed after the enforcement order has been granted.

[24] We thus reiterate that requests for stay can be made, and granted, provided the threshold under s 16 is satisfied, and also that in any event an adjudication decision is not merged into a judgment if an enforcement application is allowed under s 28 of the CIPAA, since an order obtained pursuant to s 28 of the CIPAA merely permits the adjudication decision to be enforced as a judgment of the court but is not a judgment in itself (see *EA Technique (M) Sdn Bhd v Malaysia Marine and Heavy Engineering Sdn Bhd* [2020] MLJU 2058; [2021] 1 AMR 594).

[25] As such, in order to be deserving of a stay, the appellant must satisfy the requirements set out in s 16(1)(a) and (b) of the CIPAA and to show with cogent evidence that there are special circumstances which justify the granting of a stay of the said adjudication decision.

[26] In support of its stay application, the appellant had raised a number of principal grounds, which will be examined next.

There is a pending arbitration between the parties to resolve the disputes

[27] The appellant argued that since the parties has referred the disputes on the contract and the project to arbitration proceeding, which had been scheduled to commence in only about a few months, the subject matter of the adjudication decision ought to be stayed pending the determination of the disputes. In fact, it was the respondent who submitted the right to the

jurisdiction of arbitration, having brought the subject matter of the disputes to arbitration for determination even before delivery of the adjudication decision.

[28] The respondent contended that this is an erroneous position to take, since the fact that the subject matter of the adjudication decision has since been referred to arbitration does not take away the binding effect of the said adjudication decision.

[29] We agree. Section 37 of the CIPAA plainly states that a payment dispute arising from a construction contract can be referred concurrently to adjudication and/or arbitration. It reads thus:

> 37 Relationship between adjudication and other dispute resolution process
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> (1) A dispute in respect of payment under a construction contract may be referred concurrently to adjudication, arbitration or the court.
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> (2) Subject to subsection (3), a reference to arbitration or the court in respect of a dispute which is being adjudicated shall not bring the adjudication proceedings to an end nor affect the adjudication proceedings.
>
> (3) An adjudication proceeding is terminated if the dispute being adjudicated is settled by agreement in writing between the parties or decided by arbitration or the court.

[30] It is therefore also always useful to make mention of s 13 of the CIPAA which states that an adjudication decision is binding unless firstly, it is set aside by the High Court on any of the grounds referred to in s 15; secondly, the subject matter of the decision is settled by a written agreement between the parties; or thirdly, the dispute is finally decided by arbitration or the court.

[31] Some may wonder whether the stay provisions in s 16 of the CIPAA are in conflict with the binding nature of an adjudication decision under s 13 of the same Act. They do not. The reason is simply the very essence of adjudication, which as case law authorities have held, produces merely an interim or 'temporary finality' until final resolution in one of two other dispute resolution mechanisms — arbitration or court proceedings.

[32] It is therefore irrelevant that there is an ongoing arbitration between the parties concerning the same project and that the disputes in the said adjudication decision form part of the arbitration proceeding. The fact — and law — remains that the said adjudication decision is valid, and must be complied with. In any event, all the dates initially fixed for arbitration hearing had been vacated due to the Covid-19 pandemic situation then raging in the country.

[33] In *Martego Sdn Bhd v Arkitek Meor & Chew Sdn Bhd and another appeal* [2020] 6 MLJ 224, where one of the key questions was whether the dispute ought to have been arbitrated instead of adjudicated under the CIPAA, Mohd Zawawi Salleh FCJ, delivering the judgment of the Federal Court stated:

> [76] We are not persuaded. We are fully in agreement with the learned High Court judge that there is nothing to stop the CIPAA 2012 from applying to the case at hand and there is no need to see adjudication and arbitration to be mutually exclusive to each other ...
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> [77] The High Court's view was endorsed by the majority. The majority stated:
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> > [48] In any event, an adjudication award is only of a 'temporary finality' in nature against the main contractors and owners. CIPAA 2012 allows parties to take their grievances to the High Court prior to the adjudication process, concurrent with the adjudication application and even after the adjudication process notwithstanding the adjudication decision to determine the very construction dispute before the adjudicator. Reference to an arbitration tribunal is also available to the parties and the factual findings of the adjudicator are not binding on either the High Court or the arbitration tribunal. This is specifically provided for in s 37 of CIPAA 2012.
>
> [78] Further, s 37 of the CIPAA 2012 provides that an adjudication proceeding, arbitration and court litigation may proceed concurrently and in parallel. It is also apparent that adjudication is a mandatory procedure under the CIPAA 2012 and the right to statutory adjudication should not be circumvented by any contract where parties have agreed to arbitrate.

[34] Furthermore, we emphasise that, just as importantly, even though the fact of the pending arbitration undeniably places the appellant's case as one within the ambit of the above-stated s 16(1)(b) of the CIPAA for consideration, this does not automatically result in the granting of a stay. The existence of a pending arbitration per se does not ordinarily warrant the granting a stay of an adjudication decision.

[35] That much has been made abundantly clear by Mary Lim J (as she then was) in *Subang Skypark Sdn Bhd v Arcradius Sdn Bhd* [2015] 11 MLJ 818, a pre-*View Esteem* decision, where it was held as follows:

> [25] In both cases under sub-s 16(1), the other proceedings be it for setting aside of the adjudication decision or, arbitration or court proceedings in relation to the same subject matter, are pending and the stay is really to preserve some status quo. But, it is only under either of these two situations that an application for stay may be lodged and not otherwise. This limited right is consistent with the whole scheme of CIPAA 2012, which is to afford speedy disposal of payment disputes on a temporary note of finality. During this time of pendency, be it of an application to court to set aside the adjudication decision, or where the final determination by another arbiter or court is awaited, the adjudication decision is binding on the

parties. Compliance with the adjudication decision is a given and part of the rules of the game in this industry and what CIPAA is all about in the first place.

...

[27] Since the defendant has itself issued a notice of arbitration in which it has raised the very same matters that it had raised in the adjudication, sub-s 16(2) operates. That is not to say that simply because the dispute or subject matter of the adjudication decision is now in the arbitration mode regime, the grant of stay is automatic. It is not, let alone as of right or as a matter of course. Being in arbitration merely puts the plaintiff's case as one within s 16 for consideration; or one which has crossed the threshold. The existence of concurrent proceedings merely prequalifies the plaintiff for this application.

[28] At all times, the court retains the discretion as to whether or not to grant a stay and that is obvious from the language and terms of s 16. In fact, sub-s 16(2) vests the court with discretion whether to grant the stay sought; whether to order the adjudicated amount or part of it to be deposited with the Director of KLRCA; or make any other order as the court thinks fit. Upon overcoming the threshold set in sub-s 16(1), the plaintiff still has to show how the discretion is to be exercised in its favour.

[36] In addition, the High Court in *Pasukhas Sdn Bhd v Empire Multiple Sdn Bhd and another appeal* [2019] MLJU 1393, in the judgment of Lee Swee Seng J (as he then was) succinctly reasoned that in spite of s 16(1)(b), allowing a stay merely on the fact that the arbitration had commenced with the service of a notice to arbitrate would render the entire purpose of the CIPAA futile and statutory adjudication wholly ineffective to ensure cashflow in the construction industry. It was further explained in the following terms:

[159] There is thus a dynamic balance to be preserved. If stay should be granted the moment there is a pending arbitration or litigation, then a losing party in an adjudication would be tempted just to commence these proceedings with the sure and certain expectation that a stay would invariably be granted by the court of the adjudication decision. That would scuttle and stultify the application of the CIPAA designed to facilitate cash flow in the construction industry such that a party that is already out of pocket for the work done is not put to further delay in getting paid.

[37] Without more, the fact that the dispute has been referred to arbitration is thus not a special circumstance warranting the grant of a stay of the adjudication decision. The appellant however raised other grounds to support its application for stay, contending these are special circumstances warranting the grant of a stay.

Fortuna injunction and higher value of counterclaim claims and assets

[38] The appellant raised the point that arising from the adjudication decision, the respondent had even served a statutory demand under s 466 of the

Companies Act 2016 on the appellant. This forced the appellant to seek and did manage to obtain a Fortuna injunction restraining the respondent from presenting a winding up petition against the appellant company based on the said statutory demand, pending the final disposal of the arbitration proceedings between the parties.

[39] The respondent has since appealed against the decision of the High Court on the said injunction. The respondent further posited that as the matter is now pending determination before the Court of Appeal, it ought to be dealt with in that appeal which ought not to translate into a special circumstance to warrant a stay here.

[40] We are not unmindful that the embedded philosophy of the CIPAA is the promotion of the 'pay now, argue later' approach in the adjudication process having regard to the truism in the construction industry that cashflow is its lifeblood. This also serves to recognise that a successful party to an adjudication ought not to be deprived of the fruits of a favourable adjudication decision. Attempts at negating the effect of an adjudication decision could thus result in the statutory scheme of the adjudication process under the CIPAA to be very much less than effective.

[41] We cannot nonetheless say that the concerns of the appellant are devoid of substance. The position of the appellant is that a stay would therefore be imperative since if the respondent is not restrained by the Fortuna injunction there was nothing preventing the respondent from proceeding to file a winding up petition against the appellant company and pursue the consequences arising therefrom, including a possible winding up of the appellant, notwithstanding the existence of the pendency of the arbitration proceedings, initiated by the respondent to resolve the disputes between them.

[42] We observed that earlier at the High Court, and which judgment is found in *ASM Development (KL) Sdn Bhd v Econpile (M) Sdn Bhd* [2021] 8 MLJ 99, the High Court had granted the Fortuna injunction on account predominantly of its satisfaction of the existence of serious counterclaims and set offs in the parallel arbitration proceedings which had validly given rise to a genuine dispute to the amount determined in the adjudication decision.

[43] In other words, an adjudicated sum under the CIPAA is not ordinarily construed as undisputed. This justifies the grant of a Fortuna injunction which on settled principles may only be made if the debt is bona fide disputed. It was further held that s 28 of the CIPAA on the enforcement of adjudication decision as a judgment merely afforded an order of the court to enforce the adjudication decision as if it was a judgment or order of the High Court, and that authorities in respect of an adjudication decision upon which a statutory

demand under s 466(1) of the Companies Act 2016 was based, did not decide that the debt created was not disputable even if ordered to be enforced as if it was a judgment or order of the High Court.

[44] Thus, because an adjudication decision was not entered as a judgment or deemed equal to a judgment of the High Court, it was not indisputable like a judgment of the court. Nothing in the CIPAA displaced the well-established principles governing Fortuna injunctions.

[45] In the same case, Darryl Goon J (as he then was) stated:

> [69] Having regard to the provisions of the CIPAA and the rationale for this statutory adjudication mechanism, the very nature of an adjudication decision is such that it is not final in a sense equal to the finality of a judgment of a court.
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> [70] By virtue of s 13 of the CIPAA, an adjudication decision is only provisionally binding if there are concurrent arbitration or court proceedings, or conditionally binding if there are none but there might be such proceedings to have the dispute finally determined.
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> [71] The very nature of an adjudication decision is therefore such that while it may be enforceable as if it were a judgment debt when ordered to be so, it is nevertheless *disputable*. It is still open to a party against whom the adjudication decision is given, to legally dispute the decision by way of arbitration or in court.
>
> [72] The position therefore is that a party against whom an adjudication decision is made may still dispute the decision, but until decided otherwise, the adjudication decision is to be honoured. If not honoured, and if so ordered by the court, the adjudication decision is *enforceable* as a judgment of the court, until and unless it is set aside or a final decision is arrived at to the contrary, in an arbitration or by a court of law.

[46] We are also reminded that even though reference to arbitration per se is not, as discussed above, a special circumstance, considering the circumstances of this case, we cannot disregard the fact that in this case it was the respondent, as the claimant in the adjudication process, who initiated the arbitration proceeding, and crucially it did so before the pronouncement of the adjudication decision. Reference to arbitration by the respondent in the instant case was in respect of the same dispute which was then in the process of being considered in the adjudication process. The respondent had included all the adjudicated sum in its points of claim dated 2 October 2019 filed for the arbitration proceeding.

[47] We cannot disagree with the submission of the appellant that this therefore lends some credence to the suggestion that by its own prior conduct, the respondent had always for all intents and purposes considered, if not

admitted that what then became the adjudicated amount was a disputed one pending final determination by arbitration.

[48] We further observed that on top of the statutory demand and the Fortuna injunction, other suits have also been filed against the appellant, being the unsuccessful party, for payment. The respondent has also filed an action for writ of seizure and sale of the appellant's land which is claimed to be worth RM250m. And the respondent has also successfully obtained an order for sale for the same where the auction of the land would be held in the near future.

[49] We are aware that in this case, the appellant's offer of a parcel of commercial development land as security pending the completion of arbitration proceedings was rejected by the High Court when considering the stay request, on the basis that such asset would not be immediately liquidated, and since the successful party of the adjudication would be under no obligation to accept the offer.

[50] We further observed however that quite apart from the critical risks associated with the threat of a winding up and other execution proceedings against the appellant company, the appellant's position is also that the appellant has properties worth substantially more than the amount claimed by the respondent, and as is the case with its counterclaim and/or set off against the respondent in the adjudication, where the respondent is claimed to be owing a large sum of RM142,222,574.85 to the appellant, well in excess of the adjudicated sum due to the respondent, a few times over. The combination of these considerations in our view establish special circumstances to warrant a stay pursuant to s 16(1)(b) of the CIPAA.

[51] It is useful to recall that in *View Esteem*, the Federal Court ruled that the test for a stay under s 16 of the CIPAA is not restricted to considering only the financial capacity of the claimant to repay the appellant, but instead that although a stay would not be readily given, the courts have the flexibility of granting a stay where there are clear errors or to satisfy the justice of the individual case.

[52] After all in *View Esteem*, it was held that the financial capacity of the winning party of an adjudication decision should not be the only consideration when deciding whether the court should grant a stay. It is no doubt a key factor, given the entire purpose of the CIPAA, but it is not the only main consideration.

Repayment capability of the respondent

[53] Precisely because an adjudication decision bears the character of interim finality — albeit being immediately binding and enforceable at the same time — it is patently understandable and unsurprising that parties to the adjudication proceeding, especially if unsuccessful would be justifiably concerned that the decision may be eventually superseded by an arbitral award or judgment of a court of the same subject matter of the dispute in favour of the unsuccessful party in the adjudication. But by then the successful party may not be in a position to pay back.

[54] As such, and assuming for argument sake the other considerations discussed earlier do not amount to special circumstances, the appellant here must thus show one in the form of the likely inability of the respondent claimant to pay back the adjudicated sum should it be required to do so after the arbitration. This is an important consideration in stay applications and in our view continues to be so, alongside the other two key threshold requirements pronounced in *View Esteem*.

[55] The respondent before us asserted to be in a good financial position since the date the parties entered into the contract, and that there is no danger of the respondent not being able to pay the money back to the appellant in the event the appellant is ultimately successful in the arbitration proceedings. The respondent is a wholly owned subsidiary of a public listed company and it is noted that the CCM company search results as registered as at 20 September 2019 appeared to demonstrate that the respondent company's financial status in respect of its financial year ended 30 June 2018 was positive and healthy.

[56] In particular, the respondent had generated revenue of RM728m; had total assets of RM640m, as against total liability of only about RM300m, thus recording a net asset of RM340m. This translated into the respondent generating pre-tax profit of RM113m and after tax profit of RM86m. In that same financial year, the respondent had recorded dividends distribution amounting to RM21m.

[57] In other words, these figures seem to suggest that there is absolutely no good reason to doubt the respondent's ability to repay the adjudicated amount should the appellant later succeed in the arbitration proceeding.

[58] To such extent, we cannot disagree that it seems only right that a dissatisfied party from the adjudication decision ought to pay the adjudicated amount that is due first and finally resolve the dispute in hand in another forum such as arbitration or court litigation.

[59] However the appellant has, in our view successfully, exhibited a contrary picture of the respondent's financial strength. The CCM search on the

respondent, as highlighted by the appellant, shows that there appears to be a number of open charges and unsatisfied debts amounting to some RM84,022,000 still owing by the respondent to a number of financial institutions. In light thereof, the above-stated after tax profit of RM86 million therefore represents a surplus of only about RM2.5m after deducting the indebtedness to the financial institutions.

[60] What this means is that — at least from this important perspective — in the event the adjudication decision is reversed and the respondent is then liable to pay the appellant's sizeable counterclaim and set off at the conclusion of the arbitration process, there might be a risk of the respondent being unable to repay the adjudicated amount to the appellant.

[61] This wholesome assessment on the respondent's financial position appears not to have been fully undertaken nor appreciated by the High Court in dismissing the stay application. The High Court instead considered that this was not sufficiently cogent to suggest that the respondent would be insolvent any time soon or that it would not be able to pay the adjudicated sum should the appellant succeed in arbitration. This lack of clarity in the true financial capability of the respondent to pay back the adjudicated sum, if required, is a special circumstance that justifies a stay of the adjudication decision pending final determination of disputes pursuant to the arbitration process.

Other considerations

[62] It bears repetition that we are all too aware that the overarching essence of the CIPAA is that although an adjudication decision only yields interim finality, the effect of an adjudication decision is that the unsuccessful party must still 'pay first and argue later'.

[63] We find however that the appellant has not convinced us as to what were the clear and unequivocal errors in the adjudication decisions, or in respect of denial of natural justice and the excess of jurisdiction by the adjudicator in determining the disputes between the parties in the adjudication proceedings.

[64] But the appellant did satisfactorily highlight and assert that it has a genuine and valid set off or counterclaim of the sum of RM276,581,893.96 against the respondent in the arbitration proceeding, which doubtless exceeds the adjudicated amount as determined in the adjudication decision, of RM59,767,269.32.

[65] This counterclaim sum in the arbitration proceeding is more than four times the adjudicated sum due to the respondent as the claimant in the adjudication process. It is noted that the counterclaim arises following the

alleged default of the respondent in wrongfully terminating the relevant contract and subsequently abandoning works at site. The case of the appellant is that as a consequence of this alleged default by the respondent, the appellant had to take over the abandoned works and, in the process had to incur additional costs in completing the works under the project.

[66] The respondent submitted however that the arguments and counterclaim raised by the appellant here have also been similarly raised in a separate adjudication proceeding commenced by the respondent against the appellant under the same contract (but in respect of Progress Claims No 25 and No 26) whereby the learned adjudicator in her adjudication decision of 17 September 2019 dismissed all the counterclaim of the appellant. And this decision has also been enforced by the High Court, which is being appealed by the appellant.

[67] But the appellant also insisted on its true grievances should be finally ventilated and determined. Whilst we affirmed the decision of the High Court in allowing the enforcement of the adjudication decision in favour of the respondent and dismissing the appellant's setting aside application, the principles governing stay under the CIPAA are of different considerations, as alluded to above, principally in light of *View Esteem* and its construction of s 16 of the CIPAA, conferring flexibility to the courts to stay the adjudication award where there are clear errors, or to meet the justice of the individual case.

[68] Whilst there may have been no clear errors to justify a stay in this case (more so after we agreed with and affirmed the decision of the High Court enforcing the award and dismissing the setting aside), we must also consider if the facts and circumstances here warrant a stay in order to fulfil the justice of this case.

[69] We have, in our judgment, found this to be the case. Whilst no single factor qualified as a special circumstance, the combination and cumulative effect of the various considerations, as discussed above, means that the appellant has succeeded in establishing special circumstances to warrant a stay under s 16 of the CIPAA.

[70] Further, it cannot be ignored that among the several important issues that the appellant sought to ventilate at the arbitration proceedings include whether the time for completion is at large; whether the certificate of non-completion is valid; whether the appellant had the right to impose liquidated and ascertained damages (LAD) of RM14,005,040 on the respondent; whether based on cl 25.4(d) of the PAM Contract, the appellant is liable to make further payment to the respondent after termination of contract until issuance of final account.

[71] Other issues included whether the issuance of the certificate of payment is a condition precedent to the respondent's right to receive payment; whether the defective works claim is bona fide; whether the respondent wrongly terminated the contract; and whether the respondent is liable to the appellant for the delay caused in the handing over of vacant possession to 1,403 units of end-purchasers.

[72] It must be stated however, that courts are not at liberty to review an adjudication decision in a stay application as if it were an appeal against the adjudication decision (see the High Court decision in *Enra Engineering and Fabrication Sdn Bhd v Gemula Sdn Bhd and another case* [2020] 7 MLJ 482).

CONCLUDING OBSERVATIONS AND DECISION

[73] Accordingly, in the circumstances of this case, we conclude that the appellant here is deserving of a stay against the adjudication decision. This, we reiterate is based on the fact of the combination of factors.

[74] Thus, the appellant had secured a Fortuna injunction and there is a pending writ of seizure and sale of the appellant's land which is scheduled for auction wherein the writ reserve price is stated as RM250m and the appellant contended that the land is worth RM400m.

[75] There is also the added factor of the possibility of the project being jeopardised, thereby affecting the interest of 1,403 end purchasers of the said project. We also take cognisant of the appellant's counterclaim, particularly for LAD which had been dismissed by the adjudicator in circumstances where it appeared that the respondent had not met the deadline for handing over.

[76] And without delving into the merits of the dispute, we observed that even if the time of completion was validly extended, there is still that question of the appellant's right to recover a substantial amount under its counterclaim against the respondent which is all now pending the arbitration proceeding.

[77] Furthermore, above all, the appellant has also shown that it is not a certainty that the respondent's financial strength would enable a payment back to the appellant should the appellant win its case at arbitration.

[78] In other words, we are satisfied that given the circumstances of this case, a stay would not defeat the statutory intent of the CIPAA to ensure cash flow in the construction industry.

[79] Given all such circumstances, particularly on the combination of all such factors in this case, we find that this is a fit and proper case deserving of a

A stay under s 16(1)(b) of the CIPAA. It is in the interest of justice for the adjudicated decision to be stayed pending the final determination of the disputes by the arbitration. The High Court's refusal of stay under s 16 of the CIPAA is as such erroneous.

B **[80]** Accordingly, the High Court order dated 29 November 2019 is set aside and we grant order in terms of prayer 1 of encl 1 of OS WA-24C-118–07 of 2019. The appeal against the decision of the High Court rejecting the stay is allowed. We also order cost of RM18,000. here and below to the appellant, subject to allocator.

C

Order accordingly.

Reported by Ashok Kumar

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